LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 21 1965
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 1088

JOSEPH LOMBARDOZZI, DANIEL JOSEPH MARINO, MICHAEL JOSEPH ZAMPELLO, CAMILLO CHARLES LOMBARDOZZI and GEORGE LOMBARDOZZI,

*Petitioners,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EVSEROFF, NEWMAN & SONENSHINE
*Attorneys for Petitioners*
Office & P. O. Address
186 Joralemon Street
Brooklyn, New York 11201
UL 5-1111

WILLIAM SONENSHINE
*Member of the Bar of the Supreme Court of the United States*
*Of Counsel*

# INDEX


PAGE

Opinions Below ..... 1

Jurisdictional Grounds in This Court ..... 2

Questions Presented ..... 2

Constitutional Provisions and Statutes Involved ..... 3

Facts Material to the Questions Presented ..... 3

Jurisdictional Grounds in the District Court ..... 6

ARGUMENT: ..... 7

I. The Court below erred in denying to petitioners access to the Government's records as to the mental stability of the witness ..... 7

CONCLUSION ..... 11

APPENDICES

(A) Opinion of the United States Court of Appeals .. 1a

(B) Opinion of Judge Bruchhausen, United States District Court, Eastern District of New York .. 4a

(C) (1) United States Constitution, 14th Amendment 8a
(2) Rule 33, Federal Rules of Criminal Procedure 8a


AUTHORITIES CITED:


Brady v. Maryland, 373 U. S. 83 (1962) ..... 10

District of Columbia v. Armes, 107 U. S. 519 (1882) .... 8

U. S. v. Hiss, 88 F. Supp. 559 (S. D. N. Y. 1950) ..... 9

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

JOHN JOSEPH LOMBARDOZZI, DANIEL JOSEPH MARINO, MICHAEL JOSEPH ZAMPELLO, CAMILLO CHARLES LOMBARDOZZI and GEORGE LOMBARDOZZI,

*Petitioners,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:*

The above named petitioners respectfully pray this Court for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit as follows:

### A. Opinions Below

The United States Court of Appeals for the Second Circuit unanimously affirmed on March 25, 1965, an order of the United States District Court for the Eastern District of New York (Walter Bruchhausen, Judge) which order denied a motion for a new trial on the ground of newly

discovered evidence and to vacate a judgment of conviction and for further relief, in aid of said motion, for an order compelling the Government to produce certain medical records in its possession relating to the medical history of one Hector Mangual, a prosecution witness.

The opinion of the United States Court of Appeals for the Second Circuit (not yet officially reported) is set forth in its entirety in Appendix "A" hereto.

The opinion of the Honorable Walter Bruchhausen, Judge of the United States District Court for the Eastern District of New York (not yet officially reported) is set forth in Appendix "B" hereto.

There were no other opinions written in connection with the case.

### B. The Grounds on Which the Jurisdiction of This Court Is Invoked

Jurisdiction of this Court is invoked under Title 28, §1254, subdivision 1 of the United States Code, and under Rule 19, subdivision 1, of the Rules of this Court.

The Judgment and order sought to be reviewed herein is the judgment and order of the United States Court of Appeals for the Second Circuit entered on March 25, 1965, as aforesaid.

### C. The Questions Presented for Review

1. Did the Courts below err in refusing to compel the Government to disclose the medical records of the aforesaid witness Hector Mangual in aid of the motion for a new trial where said records were in the exclusive custody and control of the United States Government.

### D. Constitutional Provisions and Statutes Involved

1. The constitutional provision involved is the due process clause of the Fourteenth Amendment to the United States Constitution.

2. The statute involved is Rule 33, Federal Rules of Criminal Procedure.

Each of the foregoing is set forth verbatim in Appendix "C" of this petition.

### E. A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented

Petitioners were originally tried in the United States District Court, Eastern District of New York, for violation of U. S. Code, Section 111, under Indictment No. 63-CR-324 before the Honorable Walter Bruchhausen, a Judge of said Court and a jury. Following the jury's verdict of "guilty", each petitioner was sentenced on January 21, 1964 by Judge Bruchhausen to be committed to the custody of the Attorney General for a period of 24 months.

Upon appeal to the U. S. Court of Appeals for the Second Circuit, said judgment of conviction was affirmed on August 4, 1964 (335 F. 2d 414).

A petition for certiorari was denied by this Court on or about November 16, 1964 (379 U. S. 914).

Following the imposition of sentence as aforesaid, petitioners moved in the District Court for a new trial based upon statements made by one Hector J. Mangual, a Government witness at the trial, that he had falsely testified with respect to his identification of the petitioners.

Upon the hearing, the said Mangual repudiated his recantation of the trial testimony thus maintaining that his original trial testimony was the truth. He also asserted that the recantation was made as the result of coercion allegedly exerted by all of said petitioners with the exception of petitioner George Lombardozzi. The motion for a new trial was withdrawn.

As a result of these charges by Mangual, all of said petitioners with the exception of George Lombardozzi were indicted along with Frederick S. Abrams, Esq., the attorney who represented appellants Zampello and Marino upon the original trial. Said indictments charged them with a conspiracy to obstruct justice. Trial was held upon said indictments in the U. S. District Court for the Southern District of New York in July, 1964. On or about July 22, 1964, all defendants were acquitted by the jury.

Upon said second trial, there was delivered to petitioners' attorneys by the U. S. Attorney, a copy of a report dated March 19, 1964 by the Federal Bureau of Investigation, relating to the mental condition of said Manugual. Said report was marked for identification at the trial as Defendants' Exhibit B. A copy thereof is part of the record filed below, which record is filed with this petition.

Said report contains, among other things, the following statement by Captain J. M. Laudenslager, Clinical Psychologist, Medical Service Corps, Bureau of Naval Medicine and Surgery, U. S. Navy, with respect to the mental stability of said Mangual:

> "Upon information appearing in the file, he would consider Mangual mentally unstable • • • Mangual has a personality or character disorder of long standing

which was pre-existent of his entry into the Marine Corps. This condition is not subject to change and will continue throughout his lifetime if not properly treated. This condition causes the patient to manipulate situations in which he may be involved for personal gain. The above condition was the cause of Mangual having been discharged from the Marine Corps on April 1, 1955."

Said information with respect to Mangual's mental stability was not known to appellants at the time of their trial and conviction, nor could it have been reasonably discovered in the exercise of due diligence. Said information was not cumulative and if known to the trial court and jury at the time of said trial, would have altered the verdict so as to render same in favor of appellants.

The materiality of Mangual's mental instability arises from the fact that upon the trial he testified at great length, during the course of which testimony he identified all of the above appellants with the exception of George Lombardozzi as having participated in the assault which was the subject of the indictment then being tried.

In addition Mangual's mental instability was patently known to the U. S. Government through the records of the U. S. Marine Corps and the Bureau of Naval Medicine and Surgery. Thus, it was at least constructively within the knowledge of the U. S. Attorney's Office as an agency of the U. S. Government. As such, the U. S. Attorney was chargeable with knowledge thereof and the failure to make such information known at the time of said trial also amounts in law to a suppression of material evidence.

It was the primary position of petitioners that they could not proceed to establish their basis for a new trial without having access to all of the medical information which was in the exclusive possession of the Government, and that the Government should be compelled to produce said records in Court so that the Court could have before it all the pertinent information relative to the mental instability of the witness. The Court refused to grant such relief.

The Government urged that the medical records would not be material since at best it would go only to destroy the credibility of the witness. Such a result, the Government argued, would not be a sufficient basis to set aside the verdict.

The Government further submitted in opposition to the motion an affidavit of the aforementioned Captain Laudenslager in which he stated that contrary to the statement of Agent Sloan he did not advise Sloan that Mangual was *mentally* unstable, but, rather, he advised Sloan "that the available information suggested *emotional* instability."

### F. Basis for Jurisdiction in the United States District Court

The jurisdiction of the United States District Court for the Eastern District of New York was invoked upon the ground that the original judgment of conviction was had in said Court and that, accordingly, the motion for a new trial was necessarily within the jurisdiction of said Court.

### G. Argument Amplifying the Reasons Relied on for the Allowance of the Writ

## POINT ONE

**The Court below erred in denying to petitioners acc ss to the Government's records as to the mental stability of the witness.**

As previously indicated petitioners sought, in aid of the motion for a new trial, to compel the Government to produce in Court its records as to the mental stability of the witness Mangual. That such records do in fact exist is admitted by the Government in the affidavit of Captain J. M. Laudenslager of the Bureau of Medicine and Surgery (18a-20a).

The instant motion for a new trial was based upon newly discovered evidence consisting of an F. B. I. Report indicating in no uncertain terms that one Hector Mangual (a witness by whose trial testimony four of the five appellants were identified as the perpetrators of the assault) was "mentally unstable". More specifically, the F. B. I. Report stated, in part (10a-11a):

> "Captain J. M. Laudenslager, Clinical Psychologist, Medical Service Corps, Bureau of Naval Medicine and Surgery, United States Navy, advised after reviewing the medical record of HECTOR J. MANGUAL, Marine Service No. 120 41 20, advised that based upon information appearing in the file he would consider MANGUAL *mentally unstable.* Captain Laudenslager advised examinations of MANGUAL at various times at various naval hospitals indicate MANGUAL has a personality or character disorder of long standing which was pre-

existent of his entry into the Marine Corps. *This condition is not subject to change and will continue throughout his lifetime if not properly treated. This condition causes the patient to manipulate situations in which he may be involved for personal gain.*"

* * * * *

"Captain Laudenslager concluded *he would be apprehensive of any statement or testimony* MANGUAL *made* in view of his medical record while in the United States Marine Corps. Dr. Laudenslager noted this opinion is based solely upon information in the record and does not take into consideration any treatment he may have had since discharge." (Italics supplied.)

It is readily apparent the Government had in its possession (although perhaps unknowingly at the time of trial) information establishing that Mangual was by reason of mental instability either totally incompetent to have testified at the trial or, at the very least, was deranged to the extent that the Court and jury should have been made aware of his condition in order to assess the quality of his alleged eyewitness identifications.

The mental condition of a witness is, of course, a vital factor in determining firstly, his competency to testify at all and, secondly, the probative value of such testimony if received. As stated by the United States Supreme Court in *District of Columbia* v. *Armes*, 107 U. S. 519, 521-522:

"It is undoubtedly true that a lunatic or insane person may, from the condition of his mind, not be a competent witness. His incompetency on that ground, like incompetency for any other cause, must be passed upon by the court, and to aid its judgment, evidence of his

condition is admissible. But lunacy or insanity assumes so many forms, and is so often partial in its extent, being frequently confined to particular subjects, whilst there is full intelligence on others, that the power of the court is to be exercised with the greatest caution."

* * * * *

"The general rule, therefore, is, that a lunatic or a person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity."

See, also *U. S.* v. *Hiss,* 88 F. Supp. 559 (S. D. N. Y. 1950).

It must be stressed here that the purpose of seeking the information in the Government's possession was not to offer it *carte blanche* upon the hearing. Obviously, the mere reports themselves would not be admissible. But disclosure of the names of the persons who had examined Mangual was essential in order to subpoena them upon the hearing to testify as to the nature of Mangual's "mental instability".

It should not be overlooked that *this information is in the sole and exclusive possession of the Government.* Without it, petitioners are for all practical purposes foreclosed from pursuing their statutory remedy to seek a new trial.

Petitioners were thus in the anomalous position below where if any relief from the judgment were in law and fact

available to them, they perforce had to seek it by calling upon their prosecutors to disclose it.

We therefore urge that it does not behoove the Government to place obstacles in the path of petitioners' quest for the facts which may afford them legitimate relief.

Underlying appellants' position herein are the simple principles of fairness so aptly phrased by Mr. Justice Douglas in *Brady* v. *Maryland*, 373 U. S. 83, 87-88 (1962):

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The principle of *Mooney* v. *Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile', to use the words of the Court of Appeals, 226 Md. at 427, 174 A. 2d, at 169."

## CONCLUSION

**The Petition for Certiorari should be granted.**

Dated: Brooklyn, New York
April, 1965

Respectfully submitted,

EVSEROFF, NEWMAN & SONENSHINE
*Attorneys for Appellants*

WILLIAM SONENSHINE
*Of Counsel*

## APPENDIX A

### Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 396—September Term, 1964.

(Argued March 19, 1965 Decided March 25, 1965.)

Docket No. 29431

UNITED STATES OF AMERICA,

*Appellee,*

—against—

JOHN JOSEPH LOMBARDOZZI, DANIEL JOSEPH MARINO, MICHAEL JOSEPH ZAMPELLO, CAMILLO CHARLES LOMBARDOZZI and GEORGE LOMBARDOZZI,

*Appellants.*

Before:

MOORE, KAUFMAN and MARSHALL,

*Circuit Judges.*

Appeal from an order, Walter Bruchhausen, *Judge,* United States District Court, Eastern District of New York, denying a motion for a new trial on the ground of newly discovered evidence, to vacate the judgment of conviction and for other relief.

Order affirmed.

RAYMOND BERNHARD GRUNEWALD, Assistant United States Attorney (Joseph P. Hoey, United States Attorney, Eastern District of New York, Brooklyn, New York), *for the appellee.*

WILLIAM SONENSHINE, New York, New York (Evseroff, Newman & Sonenshine), *for the appellants.*

PER CURIAM:

This is an appeal from the denial of a motion: (1) for a new trial on the basis of newly discovered evidence; (2) to vacate the judgment of conviction; and (3) for the production of medical records of Hector Mangual, a government witness.

The Lombardozzis were tried and convicted in November, 1963, for assault on an FBI agent. This conviction was affirmed by this Court, 335 F. 2d 414 (2 Cir.), and a petition for certiorari was denied 379 U. S. 914 (1964). In a subsequent proceeding, the defendants obtained an FBI agent's report concerning a Navy psychologist's diagnosis of Mangual's mental and emotional state. They claim that this report, together with Mangual's medical record during his Marine Corps service from 1951 to 1955, would vitiate his testimony and probably would have produced a different verdict if available at the assault trial.

The District Court, in denying the requested relief, concluded that: (1) the defendants sought a new trial merely to impeach the credibility of a witness but that this objective had been held to be insufficient for a new trial under the test derived from *United States* v. *Costello,* 255 F. 2d 876 (2 Cir.), *cert. denied,* 357 U. S. 937 (1958) and *Berry*

v. *State*, 10 Ga. 511, 527 (1851); and (2) under the test of *Larrison* v. *United States*, 24 F. 2d 82 (7th Cir. 1928), it was not satisfied that the testimony of the witness "was false in its material aspects" but was convinced that other evidence (namely, the testimony of six or seven other witnesses) "overwhelmingly" established defendants' guilt.

The grant or denial of a motion for a new trial is largely within the discretion of the trial court. Furthermore, such motions are "not favored and should be granted only with great caution." *United States* v. *Costello*, *supra*, at 879. In the present case, the trial court correctly formulated the relevant tests for granting a motion for a new trial and properly applied these tests.

There is no contention here that the prosecution wilfully or in bad faith suppressed the evidence relied upon. This new evidence consisted of a mere summary by an agent without medical training of the diagnosis of a Naval doctor. In addition, the psychologist later qualified his original diagnosis in an affidavit, presented in response to the motion for a new trial, in which he stated: (1) that he had never interviewed or had even seen Mangual; (2) that he had no information concerning the nine years of Mangual's life since his discharge from the Corps; and (3) that in his original diagnosis he had stated that he considered Mangual emotionally rather than mentally unstable.

Order affirmed.

## APPENDIX B

### Opinion of Hon. Walter Bruchhausen, Denying Motion

BRUCHHAUSEN, *D.J.*:

The defendants move by order to show cause for an order granting a new trial upon the ground of newly discovered evidence, for the vacating and setting aside of the judgment of conviction herein, for a hearing upon the issues raised by this motion, and for the production of the medical records of Hector Mangual, during his service in the Marine Corps, from 1951 to 1955. Mangual was a Government witness in the trial of the defendants on an assault charge.

In November 1963, the defendants were tried on the said assault charge, Mangual was one of seven witnesses, produced by the Government at that trial. The record of that trial has been submitted on this motion. The jury returned a verdict of guilty. The judgment of conviction was sustained by the Court of Appeals on August 4, 1964. Its opinion is reported in 335 F. 2d 414. A petition for certiorari was denied by the United States Supreme Court in November 1964.

In February 1964 the defendants moved for a new trial upon the ground that Mangual recanted his trial testimony. This Court ordered a hearing. At the hearing, Frederick S. Abrams, the attorney for several of the defendants, produced a tape recording of Mangual's alleged recantation. It was played back in open court. In that recording, Mangual recanted his entire trial testimony at the assault trial. Immediately after it was played back Mangual testified that the only reason he made this alleged recantation was to ease the pressure and fear of the lives of his family and

himself brought about by the defendants. The defense then moved for the withdrawal of the motion for a new trial.

Abrams and the defendants excepting George Lombardozzi, were indicted and charged with conspiracy to obstruct justice. They were acquitted. It was not until that trial, held in July 1964, that it became known that Mangual allegedly suffered from mental or emotional instability some nine years prior to his appearance at the said assault trial. This alleged mental or emotional instability of Mangual while serving in the Marine Corps during the period from 1951 to 1955 is the basis for the present motion for a new trial.

It should be noted that defense counsel, during the argument of this motion for a new trial, stated that the defendants do not claim actual suppression of evidence by the Government. They assert that the Government had constructive notice of Mangual's mental condition, while in the Marine Corps, because he had been in the service of a Government agency, the Marine Corps.

It is settled law that motions for new trials are not favored and should only be granted with great caution, that such motions are always addressed to the discretion of the trial Judge and that the burden of proof rests upon the defendants. See United States v. Costello, 2 Cir., 255 F. 2d 876, certiorari denied, 357 U. S. 937; United States v. Fassoulis, 203 F. Supp. 114 and United States v. Soblen, 203 F. Supp. 542, 564.

In United States v. Costello, supra, the Court, at page 879, stated:

> "The federal courts in varying circumstances have used either of two recognized tests or standards to determine when new trials should be permitted. One of these tests was originally laid down in the case of

Berry v. State, 10 Ga. 511, 527, where the court listed the following six requirements:

"1st. That the evidence has come to his knowledge since the trial.

"2nd. That it was not owing to the want of due diligence that it did not come sooner.

"3d. That it is so material that it would probably produce a different verdict, if the new trial were granted.

"4th. That it is not cumulative only—viz.: speaking to facts, in relation to which there was evidence on the trial.

"5th. That the affidavit of the witness himself should be produced, or its absence accounted for.

"And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness.

"The other test was developed in the case of Larrison v. United States, 7 Cir., 24 F. 2d 82, wherein the following three requirements were specified:

"'(a) The court is reasonably well satisfied that the testimony given by a material witness is false.

"'(b) That without it the jury might have reached a different conclusion.

"'(c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.' 24 F. 2d at pages 87-88.

* * * * *

"It has been stated that the Larrison rule is limited to cases of 'recantation or where it has been proved that false testimony was given at the trial.' United States v. Hiss, D. C. S. D. N. Y., 107 F. Supp. 128, 136, affirmed 2 Cir., 201 F. 2d 372, certiorari denied 345 U. S. 942, 73 S. Ct. 830, 97 L. Ed. 1368."

The defendants' motion must fail because it does not qualify under either test. Applying the Berry rule above alluded to, it is apparent that the defendants seek a hearing merely to impeach the credibility of the witness, Mangual. Secondly, the evidence produced by the Government at the assault trial so overwhelmingly supports the judgment of conviction that the lack of testimony of any of the prosecution's witnesses, and, as previously stated there were seven witnesses, would not probably produce a different verdict. Thirdly, Mangual's testimony was cumulative.

Under the Larrison test, the motion must likewise fail because (1) the court is not satisfied that the testimony of Mangual was false in its material aspects, and (2) the evidence adduced overwhelmingly established the defendants' guilt.

Furthermore, the alleged claim of mental or emotional instability of Mangual some nine or more years ago would be of no probative value as to his present condition. It is too remote. Such evidence, if admissible, would merely affect the weight of the evidence or the credibility of the witness.

The motion is in all respects denied.

Settle order on two (2) days' notice.

WALTER BRUCHHAUSEN
*U.S.D.J.*

## APPENDIX C

1. AMENDMENT XIV to the United States Constitution

"Section 1. * * * nor shall any state deprive any person of life, liberty or property without due process of law * * *."

2. Rule 33, Federal Rules of Criminal Procedure

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

# In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1088

JOHN JOSEPH LOMBARDOZZI, DANIEL JOSEPH MARINO, MICHAEL JOSEPH ZAMPELLO, CAMILLO CHARLES LOMBARDOZZI AND GEORGE LOMBARDOZZI, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A. 1a–3a) is reported at 343 F. 2d 127. The opinion of the district court (Pet. App. B. 4a–7a) is reported at 236 F. Supp. 957.

### JURISDICTION

The judgment of the court of appeals was entered on March 25, 1965. The petition for a writ of certiorari was filed on April 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

774-420—65

## QUESTION PRESENTED

Whether, in denying a motion for a new trial on the ground of newly discovered evidence, the trial court erred in refusing to order the government to produce medical records with respect to a witness at the trial.

## STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of having forcibly assaulted F.B.I. Agent John Foley while he was engaged in the performance of his official duties. Each was sentenced to imprisonment for twenty months. The court of appeals affirmed, 335 F. 2d 414, and this Court denied certiorari, 379 U.S. 914.

The evidence introduced at petitioners' trial is set forth in the government's brief in opposition in No. 441, O.T. 1964. Briefly, it showed that Agent Foley had been assigned to conduct a surveillance at the funeral of Carmello Lombardozzi. While he was carrying out this assignment, he was attacked. Hector Mangual, a funeral limousine driver, was one of the witnesses who named the assailants. He identified four of the petitioners.[1]

About two months after conviction, petitioners moved for a new trial on the ground that Hector Mangual had recanted his trial testimony (1 R. 5–6). At a hearing on February 25, 1964, they called Mangual as their sole witness and played a recording of his recantation (2 R. 3–4). When Mangual

[1] He did not identify George Lombardozzi.

explained that he had made the recording through fear, petitioners withdrew their motion (2 R. 5–8).

As a result of this proceeding, the four petitioners whom Mangual had identified were charged with conspiracy to obstruct justice. They were tried in July 1964 and acquitted. At this trial the government turned over to the defense an F.B.I. report dated March 19, 1964 (1 R. 6), which summarized an interview with a Navy psychologist who had reviewed Mangual's medical record during his Marine Corps service. On the basis of this medical record, covering the period 1951–1955, the psychologist considered Mangual to be mentally unstable and concluded he would be apprehensive of any statement or testimony from Mangual (1 R. 10–11).

On November 24, 1964, eight days after the denial of the petition for a writ of certiorari in the assault case, petitioners, relying on the F.B.I. report, moved for a new trial on the ground of newly discovered evidence. They claimed that Mangual was mentally unstable at the time of trial. They also requested the production of medical reports pertaining to Mangual in the possession of the Bureau of Naval Medicine and Surgery (1 R. 3–4). The Assistant United States Attorney, in an affidavit in opposition, stated, *inter alia,* that he had not known about this medical record at the time of trial (1 R. 15).[2] On December 10, 1964, the district court denied petitioner's motion. It found that it was satisfied that Mangual's testimony was not

[2] An affidavit of the psychologist which explained his statements to the F.B.I. agent was also filed (1 R. 18–20).

false and that the evidence adduced at the trial "overwhelmingly established the defendants' guilt." The court also concluded that a new trial should not be granted merely to impeach the credibility of one witness, noting that a claim of mental incompetency some nine or more years earlier would not be probative of Mangual's present condition (Pet. App. B. 4a–7a).

## ARGUMENT

The trial court found that the evidence at petitioners' trial, where seven witnesses testified, overwhelmingly supported the conviction. It also found that the Navy officer's conclusion, based upon a medical record dating from 1951–1955, that Mangual was unstable did not show that his testimony at petitioners' trial was false. In these circumstances, the decision denying the motion for a new trial was properly affirmed. See *United States* v. *Johnson*, 327 U.S. 106.

Moreover, since the trial court justifiably concluded that Mangual's testimony had been corroborated by other evidence, the 1951–1955 medical record could not cast serious doubt on that testimony. Accordingly, the court was warranted in declining to order the production of the records pertaining to Mangual's personal history and treatment.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
*Solicitor General.*
FRED M. VINSON, JR.,
*Acting Assistant Attorney General.*
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
*Attorneys.*

MAY 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965